

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

MAY - 1 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition on Declaratory Ruling Or,)
In the Alternative, For Rulemaking)
on Defining Certain Incumbent LEC) CC Docket No. 98-39
Affiliates as Successors, Assigns,)
or Comparable Carriers Under)
Section 251(h) of the)
Communications Act)

AT&T Comments

Pursuant to the Commission's Public Notice (DA-98-627), released April 1, 1998, AT&T Corp. ("AT&T") submits these comments on the petition of the Competitive Telecommunications Association, the Florida Competitive Carriers Association, and the Southeastern Competitive Carriers Association (collectively, "Petitioners") requesting a declaratory ruling or the initiation of a rulemaking proceeding concerning the regulatory status of certain affiliates of incumbent local exchange carriers ("ILECs"). For the reasons stated below, the Commission should commence a rulemaking proceeding to determine the minimum requirements with which an ILEC must comply before any affiliate could be found not to be a successor or assign of, or comparable carrier to the ILEC.

Introduction

The ILECs have spent the last two years stubbornly refusing to comply with their obligations under Section 251 of the Telecommunications Act of 1996 to open their monopoly exchange and exchange access markets to competition. They have defied this Commission's requirements and otherwise failed to make available the wholesale access and interconnection

0612

arrangements needed to allow other carriers an opportunity to compete with them,¹ and chosen to litigate this Commission's authority and otherwise challenge the validity of its rules,² the State commissions' arbitration awards,³ and the Act itself.⁴

In this light, Petitioners (p. 2) are rightfully concerned that at least some ILECs "are transferring resources to affiliated companies to provide local and other telecommunications services within their service areas" in order to "avoid complying with important aspects of Section 251(c)" and otherwise to delay the development of local exchange competition. To reduce these risks, and eliminate marketplace uncertainty, Petitioners (p. 2) request that the Commission issue a declaratory ruling that an ILEC affiliate that "operates under the same or a similar brand name and provides wireline local exchange or exchange access service within the ILEC's region" will "be considered a 'successor or assign' of the ILEC" subject to the obligations of ILECs under Section 251(c), and "treated as a 'dominant carrier' for the provision of interstate

¹ For example, Ameritech flouts, and brazenly refuses to comply with the Commission's shared transport orders. At a recent status conference in Ohio, an Ameritech attorney stated, "[w]e believe that the shared transport order is unlawful and we would not -- or, have no intention of complying with that order until its legality is finally determined." See Status Conference, In The Matter of the Application of Ameritech Communications, Inc. for Authority To Provide Competitive Telecommunications Services in the State of Ohio (No. 96-327-CT-ACE); In The Matter of the Application of Ameritech Communications of Ohio, Inc. for a Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Services Throughout the State of Ohio (No. 96-658-TP-ACE), April 23, 1998, before the Ohio Public Utilities Commission (Statement of Kevin M. Sullivan, Esq., Attorney for Ameritech) at Tr. p. 7.

² E.g., Iowa Util. Bd., et al v. FCC, 120 F.3d 753, 792-3 (8th Cir. 1997).

³ For example, GTE has challenged every arbitrated interconnection agreement between itself and AT&T.

⁴ E.g., SBC Communications, Inc. v. FCC, 981 F. Supp. 996 (N.D. Tex. 1997).

services.” In the alternative, Petitioners (p. 2) ask that the Commission propose a rule that would establish a rebuttable presumption that such an ILEC affiliate “is a ‘comparable’ carrier under Section 251(h)(2)” subject to the obligations of an ILEC under Section 251(c), and in that rulemaking proceeding determine “the criteria under which an in-region ILEC affiliate will be considered a ‘comparable carrier’ under Section 251(h)(2).”

AT&T agrees that Commission action is warranted. For the reasons set forth below, the Commission should immediately commence, and promptly conclude, a proceeding to specify the minimum nondiscrimination, separation, transaction, and other requirements with which an ILEC must comply before any affiliate could be found not to be a successor or assign of, or comparable carrier to the ILEC. Only when an ILEC and its affiliate have satisfied such requirements should the affiliate be able to provide local exchange and exchange access services within the same serving area as the ILEC, while being deemed exempt from the obligations of incumbent local exchange carriers, and obtaining the benefits of non-dominant carrier regulation.

Argument

Petitioners explain that: “[a] number of ILECs are establishing affiliated companies to operate, purportedly, as ‘competitive local exchange carriers’ (‘CLECs’) within the ILECs’ service areas” (pp. 3 - 4); the ILECs are transferring to these affiliates valuable resources on other than commercially reasonable and arm’s length terms and conditions (pp. 5-6); and these affiliates will operate as indistinguishable alter egos of the ILEC in the provision of exchange and exchange access services in the ILEC’s own serving area (pp. 6 and 13 - 14). Petitioners are correct to conclude that these developments seriously threaten prospects for the development of local exchange competition.

First, as Petitioners recognize (pp. 6 - 7), this conduct could enable ILECs to avoid their obligations under Section 251 of the Act. For instance, as Petitioners suggest (pp. 6 - 7), ILECs might attempt improperly to avoid their resale obligations by effectively ceding portions of the market (and particular customers) to the affiliate, and then claim no obligation to make wholesale services available for those portions of the market (and decline to make customer-specific offerings available for resale).⁵ In addition, to the extent an ILEC succeeds in transferring assets, and particularly network facilities, to an affiliate, it might avoid its obligation to make available to competitors interconnection with, and unbundled access to, its incumbent network. Further, to the extent it transfers any asset on other than commercially reasonable and arm's length terms and conditions, it might well be able to avoid its obligation to make interconnection, unbundled network elements, and wholesale services available on nondiscriminatory terms and conditions.

Second, as Petitioners also recognize (p. 8), the continuing prospect that ILECs might be able to avoid their obligations through the artifice of "CLEC affiliates" introduces enormous uncertainty into the marketplace. This uncertainty increases the already substantial risks and costs of local market entry. For this reason, even if ILECs are ultimately denied the ability to avoid their Section 251 obligations through the manipulation of corporate forms, the

⁵ This would not be the first such effort to avoid the resale obligations of the Act. In Connecticut, for example, the ILEC SNET has sought to restructure itself into wholesale and retail operations in large part to escape its resale obligations. See, Submission of Southern New England Telecommunications Corporation and the Southern New England Telephone Company in, DPUC Investigation of the Southern New England Telephone Company Affiliate Matters Associated with the Implementation of Public Act 94-83, State of Connecticut Department of Public Utility Control Docket No. 94-10-05 (January 24, 1997), at 2-4.

continuing prospect that they might succeed in doing so impedes the development of local competition.

In all events, an ILEC's transfer of corporate assets to its "CLEC" affiliate, and strategic approach to the local market using that affiliate, could, as Petitioners demonstrate (pp. 8 - 15), bring that affiliate squarely within the Act's definition of "incumbent local exchange carrier" as a successor, assign, and/or comparable carrier of the ILEC (47 U.S.C. § 251(h)). The Commission has recognized as much in its Non-Accounting Safeguards Order.⁶ Specifically, in that order, the Commission concluded that if a BOC were to transfer "to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)," the Commission would "deem such entity to be an 'assign' of the BOC . . ."⁷ The Commission also recognized that a BOC affiliate that constitutes a successor, assign, or comparable carrier of the BOC would constitute an incumbent local exchange carrier pursuant to Section 251(h) of the Act.⁸

Nonetheless, the Commission has not defined the minimum criteria for determining whether a carrier constitutes an incumbent local exchange carrier pursuant to Section 251(h). To the contrary, in the Local Competition Order, the Commission declined "[a]t this time" to "adopt specific procedures or standards for determining whether a LEC should be treated as an

⁶ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905 (1996) (subsequent history omitted).

⁷ Id., at p. 22054 (para. 309).

⁸ Id., at pp. 22055-6 (para. 312).

incumbent LEC.”⁹ Now, however, in the face of ILEC attempts to establish “CLEC” affiliates, and possibly avoid their incumbent carrier obligations, and the marketplace uncertainty created by this conduct, the Commission should provide the industry needed guidance.

Thus, AT&T recommends that the Commission initiate a rulemaking proceeding to specify in detail the minimum nondiscrimination, separation, transaction, and other requirements with which an ILEC must comply before any affiliate could be found not to be a successor or assign of, or comparable carrier to the ILEC. If, and only if, an ILEC and its affiliate satisfy such requirements should the affiliate be able to provide local exchange and exchange access services within the same serving area as the ILEC, while also being deemed exempt from the obligations of incumbent local exchange carriers, and obtaining the benefits of non-dominant carrier regulation.

⁹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), para. 1248 (subsequent history omitted).

- 7 -

Conclusion

Consistent with the comments set forth above, the Commission should initiate a rulemaking proceeding to determine the minimum requirements with which an ILEC must comply before any affiliate could be found not to be a successor or assign of, or comparable carrier to the ILEC.

Respectfully submitted,

AT&T CORP.

By: 

Mark C. Rosenblum
Leonard J. Cali
James W. Grudus

Its Attorneys

Room 3250G3
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-6630

May 1, 1998

CERTIFICATE OF SERVICE

I, Karen Kotula, do hereby certify that on this 1st day of May, 1998, a copy of the foregoing "AT&T Comments" was mailed by U.S. first class mail, postage prepaid, to the parties listed below:

David L. Sieradzki, Esq.
Jennifer A. Purvis, Esq.
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004
(Attorneys for the Competitive Telecommunications
Association, the Florida Competitive Carriers
Association, and the Southeastern Competitive
Carriers Association)

Genevieve Morelli, Esq.
Competitive Telecommunications Association
1900 M Street, N.W., Suite 800
Washington, DC 20036


Karen Kotula

May 1, 1998